IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BIODELIVERY SCIENCES INTERNATIONAL, INC. and ARIUS TWO, INC.,)
Plaintiffs,))
v.)) C.A. No. 18-1395 (CFC) (CJB)
ALVOGEN PB RESEARCH & DEVELOPMENT LLC, ALVOGEN MALTA OPERATIONS LTD.,	
ALVOGEN PINE BROOK LLC, ALVOGEN,) PUBLIC VERSION
INC. and ALVOGEN GROUP, INC.,)
Defendants.) _)

PLAINTIFFS' RESPONSIVE LETTER TO ALVOGEN'S MOTION TO STRIKE

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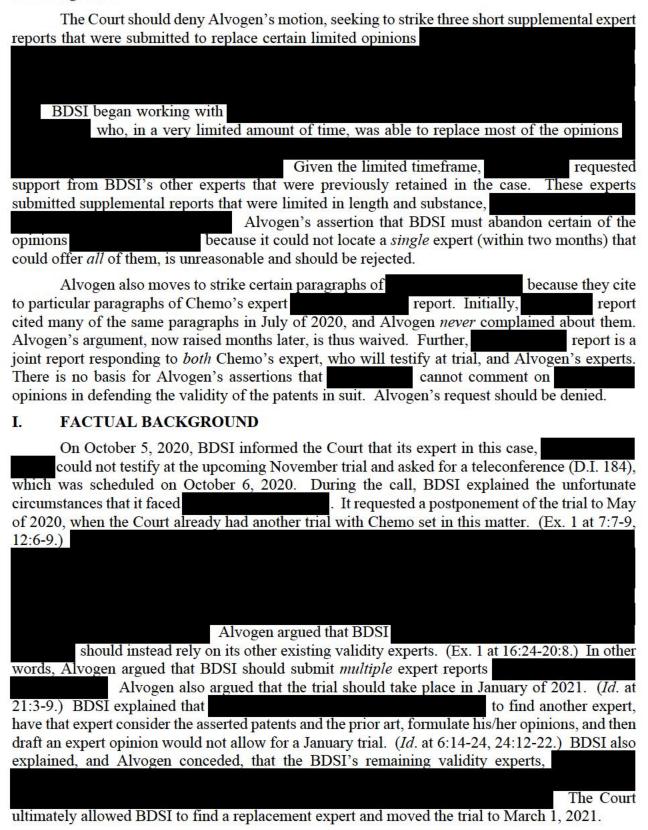
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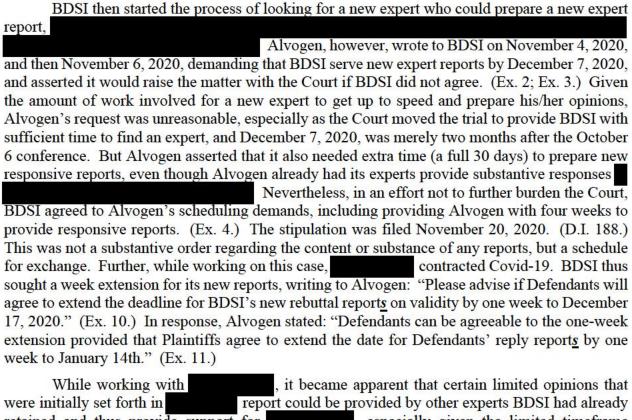
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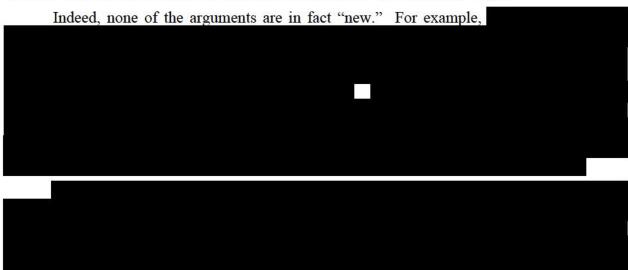
Attorneys for Plaintiffs

Dear Judge Burke:





were initially set forth in report could be provided by other experts BDSI had already retained and thus provide support for demanded by Alvogen. Thus, along with reports from its other experts on limited grounds. None of the opinions, however, were "new," as Alvogen claims. (Ex. 12.) Indeed, BDSI requested (Ex. 13), including during the meet and confer on this motion, that Alvogen identify any "new" opinions, but Alvogen refused to do so (Ex. 14; Ex. 15). In fact, it was BDSI's understanding, following the meet and confer, that Alvogen's position was that the reports were improper because BDSI was allegedly "allowed" only one substitute report, and not that any argument in the reports was allegedly "new."





II. ARGUMENT

A. The Supplemental Reports of Drs. Davies, Rauck, and Taft are Proper

here were, however, a few very limited issues that were better addressed by the other experts BDSI had previously retained. Indeed, Alvogen itself argued at the hearing that BDSI should be required to submit multiple reports (Ex. 1 at 16:24-20:8) and specifically reserved the right to submit reply reports in the stipulation (D.I. 188). And when BDSI asked for an extension due to Covid-19 diagnosis, BDSI specifically asked for an extension for its "rebuttal reports." (Ex. 10.) In response, Alvogen asked for an extension to Alvogen to set up an exchange schedule. It did not substantively limit BDSI to only a single expert report. Alvogen's position that it was allowed to submit multiple reply reports,

but that BDSI was limited to a single report, is unreasonable and should be rejected.

Further, Alvogen has not satisfied the *Pennypack* factors in its motion. (*See* D.I. 143 (explaining exclusion is an "extreme sanction").) The *first* factor examines prejudice to Alvogen. Here there is none. Alvogen itself argued that BDSI *should* submit multiple reports from its existing experts and had no problem with BDSI doing so even when it was arguing for a January trial. Further, all the opinions in the supplemental reports had been previously expressed and thus there is no surprise. Indeed, Alvogen's own experts have already addressed these opinions. Further, the supplemental opinions are short.

Moreover, Alvogen has *four weeks* to address the opinions under the schedule, and Alvogen reserved the right to serve multiple reports in response. There is no prejudice.

The remaining *Pennypack* factors do not support Alvogen. The **second** factor examines if the prejudice could be cured. Here, as mentioned, the schedule provides Alvogen with four weeks to respond to the reports, and (provided Alvogen likewise agrees for short additional depositions for its own experts submitting reports) BDSI offered Alvogen the ability to take an additional deposition of the three experts, which is something Alvogen requested. Thus, Alvogen was aware it may have to take multiple depositions. Given the short length of the reports, no more than an hour each should be needed, and like all the other expert depositions, they will be taken remotely so travel is not required. As the trial is not until March, there is no prejudice in fitting in three extra hours of depositions on opinions that Alvogen knew about since July of 2020. The third factor examines the disruption to trial. There is none as all three experts were already slated to testify. Further, BDSI accommodated Alvogen's request for four weeks to submit responsive reports and still meet the March trial date. The fourth factor examines bad faith. Here, BDSI was faced with an expert it had worked for years who could not testify that BDSI has acted in bad faith is baseless. In fact, it is BDSI that has been prejudiced by the compressed timeframe Alvogen insisted on. The fifth factor examines the importance of the information at issue.

Alvogen

can thus not be possibly prejudiced by its inclusion.

B.

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By failing to challenge , Alvogen has plainly waived any challenge to the citation of the same substantive opinions .
Even if this argument was not waived, however, it should be rejected by this Court, as submitted a joint expert report and has the right to respond to both Chemo's expert and Alvogen's expert. The trial is a joint validity trial, and the Chemo and Alvogen defendants
need to coordinate.
But this is an issue between co-defendants, not BDSI. There is certainly no valid reason to prevent
and Alvogen's request to strike should be denied.
Respectfully,
/s/ Jeremy A. Tigan
Jeremy A. Tigan (#5239)
cc: Clerk of the Court (Via Hand Delivery) Counsel of Record (Via E-mail)